

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PN II, INC. dba PULTE HOMES and/or
DEL WEBB,

Plaintiff,

v.

NATIONAL FIRE & MARINE
INSURANCE COMPANY; and DOES 1
through 100, inclusive,

Defendants.

NATIONAL FIRE & MARINE
INSURANCE COMPANY,

Counter-Claimant,

v.

PN II, INC. dba PULTE HOMES
and/or DEL WEBB,

Counter-Defendant.

NATIONAL FIRE & MARINE
INSURANCE COMPANY,

Third-Party Plaintiff,

v.

PN II, INC. dba PULTE HOMES
and/or DEL WEBB; CONTRACTORS
INSURANCE COMPANY OF NORTH
AMERICA, INC.,

Third-Party Defendants.

Case No. 2:20-cv-01383-ART-BNW

ORDER ON PLAINTIFF'S AMENDED
MOTION TO VOLUNTARILY DISMISS
(ECF No. 160)

Before the Court is Plaintiff PN II, Inc., dba Pulte Homes ("Pulte's") amended motion to voluntarily dismiss its second and fourth claims for relief. (ECF No. 160.) For the reasons stated, the Court grants Plaintiff's motion.

I. Background

The parties are familiar with the factual circumstances of this case, and the Court will thus not recite them here in full. The Court previously denied Defendant's motion for summary judgment, and for interlocutory appeal of that

order, making this case ready for trial. (ECF Nos. 131, 152.) Plaintiff has four claims pending against Defendant National Fire: (1) Breach of Contract – Duty to Defend, (2) Breach of Contract – Duty to Indemnify, (3) Tortious Breach of the Duty of Good Faith and Fair Dealing, and (4), Violation of Nevada’s Unfair Claims Settlement Practices Act. Plaintiff subsequently filed a motion to voluntarily dismiss all but Claim 1 (ECF No. 148.) Plaintiff then filed an amended motion to voluntarily dismiss only Claims 2 and 4. (ECF No. 160.) One week later, Plaintiff filed a motion in limine seeking to exclude evidence regarding Defendant’s duty to indemnify. (ECF No. 163.) Defendant filed an opposition to Plaintiff’s motion for voluntarily dismissal, and Plaintiff filed a reply. (ECF Nos. 170, 175.) Defendant then filed a motion to file a surreply to Plaintiff’s reply, with an attached proposed surreply. (ECF No.179.)

II. Motion for Leave to File Sur-Reply

As a preliminary matter, the Court grants Defendant’s motion for leave to file a sur-reply. Defendant’s motion sought leave to file a surreply to (1) “correct the record” regarding several misstatements allegedly made in Plaintiff’s reply, and (2), to address a new position taken by Plaintiff in its reply. (ECF No. 179 at 1, 2.) The Court takes no position on the alleged misstatements but finds that a surreply is warranted here due to Plaintiff’s assertion that it will limit the theories it pursues at trial regarding its bad faith claim, which was brought for the first time in its reply brief. *See Paxson v. Live Nation Ent., Inc.*, No. 2:24-CV-00907-APG-EJY, 2025 WL 894634, at *12 (D. Nev. Mar. 21, 2025) (if a reply brief raises new issues, a court may grant opposing party opportunity to respond to them); *Morgan Stanley Smith Barney LLC v. Takahashi*, No. 2:24-CV-02127-CDS-MDC, 2025 WL 35134, at *4 (D. Nev. Jan. 6, 2025) (granting leave to file surreply where new issue was raised in reply brief).

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1 **III. Motion to Voluntarily Dismiss**

2 **A. Legal Standard**

3 Plaintiff filed its motion under Federal Rule of Civil Procedure 41(a)(2),
 4 which governs voluntary dismissal of actions. In its reply, Defendant argues that
 5 a motion to voluntarily dismiss some but not all claims in an action is properly
 6 brought under Federal Rule of Civil Procedure 15(a), not Rule 41(a)(2). Indeed,
 7 the Ninth Circuit has held that “a plaintiff may not use Rule 41(a)(1)(i) to dismiss,
 8 unilaterally, a single claim from a multi-claim complaint,” and agreed that Rule
 9 15(a) was the proper mechanism for dismissal of some, but not all, claims.
 10 *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1392 (9th Cir. 1988); *Hells*
 11 *Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 688 (9th Cir. 2005)
 12 (extending this analysis to Rule 41(a)(2)).

13 Some federal courts, when faced with a Rule 41 motion to dismiss some
 14 but not all claims in an action, have construed the motion as a motion to amend
 15 under Rule 15. *Childress v. City of E. St. Louis, Ill.*, No. 10-CV-254-WDS, 2010
 16 WL 5289261, at *2-3 (S.D. Ill. Dec. 20, 2010) (considering improper Rule 41
 17 motion as motion under Rule 15); *Loma Linda Kidney Center v. Azar*, No. 15-CV-
 18 01717, 2018 WL 993000, at *4 (D.D.C. Feb. 21, 2018), *aff’d sub nom. Loma Linda*
 19 *Univ. Kidney Ctr. v. Azar*, 755 F. App’x 7 (D.C. Cir. 2018) (same); *LaserCycle USA,*
 20 *Inc. v. Balcourt*, No. 11-CV-01995-PAB-CBS, 2011 WL 5331675, at *1-2 (D. Colo.
 21 Nov. 3, 2011) (same); *but see Nor’Wester Indus., Inc. v. Vacation Structures, Inc.*,
 22 No. C08-5150RJB, 2008 WL 1968311, at *2 (W.D. Wash. Apr. 30, 2008) (denying
 23 improper motion under Rule 41).

24 The Court will construe Plaintiff’s motion as a motion to amend under Rule
 25 15(a) and analyze it under the applicable standard.¹ Under Rule 15(a)(2),

26 ¹ The Ninth Circuit has found little distinction between dismissal of a claim under
 27 Rule 15(a) and Rule 41(a)(2): “The fact that a voluntary dismissal of a claim under
 28 Rule 41(a) is properly labeled an amendment under Rule 15 is a technical, not a

1 applicable here, a party “may amend its pleading only with the opposing party’s
2 written consent or the court’s leave. The court should freely give leave when
3 justice so requires.” Fed. R. Civ. P. 15(a)(2). “Although the rule should be
4 interpreted with ‘extreme liberality,’ leave to amend is not to be granted
5 automatically.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)
6 (internal citations omitted). A trial court may deny a motion to amend where there
7 would be prejudice to the opposing party, an undue delay in litigation, or it would
8 be futile; Prejudice is the most important factor. *Id.*

9 **B. Analysis**

10 As an initial matter, Defendant does not oppose dismissal of Claim 4. The
11 Court therefore grants Plaintiff’s motion as to Claim 4 and will permit amendment
12 to dismiss that claim with prejudice.

13 As to Claim 2, Defendant argues that dismissal of that claim will result in
14 prejudice. Defendant notes that Plaintiff has filed a motion in limine which argues
15 that if dismissal of Claim 2 is granted, the issue of whether Defendant had a duty
16 to indemnify Executive Plastering (“EP”) will be moot. Defendant disagrees,
17 arguing that Plaintiff’s bad-faith claim (Claim 3) incorporates the issue of whether
18 Defendant had a duty to indemnify. Because Plaintiff’s motion for voluntary
19 dismissal seems aimed at excluding evidence regarding indemnification and
20 coverage, Defendant argues, to the extent that granting Plaintiff’s motion would
21 have that effect, Defendant will suffer prejudice. Defendant suggests that if the
22 Court is inclined to grant Plaintiff’s motion as to Claim 2, dismissal should be
23 with the condition that its “right to present evidence of what its policies did (and
24 did not) insure is fully preserved,” and that “the jury will be instructed to evaluate
25 the scope of any indemnity obligation by National Fire before it makes any

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27 substantive, distinction.” *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d
28 683, 689 (9th Cir. 2005) (quoting *Nilssen v. Motorola, Inc.*, 203 F.3d 782, 784
(Fed. Cir. 2000)).

1 findings on Pulte’s bad-faith claims.” (ECF No. 170 at 22.) Plaintiff, in reply,
2 argues that these conditions would amount to premature evidentiary rulings by
3 the Court.

4 The Court finds that Defendant has not shown prejudice as a result of
5 dismissal of Claim 2 alone. Rather, Defendant’s argument is premised upon an
6 evidentiary ruling that the Court has yet to make. Defendant has argued only
7 that it would be prejudiced in defending against the bad faith claim if it cannot
8 “address the scope of its indemnity obligations . . . and why its coverage position
9 was reasonable.” (ECF No. 170 at 18.) But dismissal of Claim 2 does not mean
10 that the Court will grant Plaintiff’s motion in limine seeking to exclude evidence
11 regarding indemnification. If, as Defendant asserts, the issue of indemnification
12 is relevant to other claims or counterclaims, the Court will—as is always the
13 case—admit relevant admissible evidence on this issue at trial. A dismissal of
14 Claim 2 is not an evidentiary ruling that evidence regarding indemnification is
15 inadmissible. Thus, the Court finds that Defendant has failed to show prejudice
16 resulting from dismissal of Claim 2. Plaintiff’s motion, construed as a motion for
17 leave to amend to dismiss Claim 2 with prejudice, is granted.

18 The Court takes no position on Plaintiff’s motion in limine to exclude
19 evidence regarding the duty to indemnify. This motion will be addressed in a
20 separate order.

21 **IV. Conclusion**

22 It is therefore ordered that Plaintiff’s amended motion to voluntarily
23 dismiss Claim 2 and 4, construed as a motion to amend (ECF No. 160) is
24 GRANTED.

25 It is further ordered Plaintiff’s Claims for Breach of Contract – Duty to
26 Indemnify and Violation of Nevada’s Unfair Claims Settlement Practices Act are
27 hereby DISMISSED WITH PREJUDICE.

28 It is further ordered that Plaintiff’s motion to voluntarily dismiss (ECF No.

1 148) is DENIED AS MOOT.

2 It is further ordered that Defendant's motion for leave to file a surreply (ECF
3 No. 179) is GRANTED.

4 Dated this 29th day of May, 2025.

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7 ANNE R. TRAUM
8 UNITED STATES DISTRICT JUDGE
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